



Utah Governor's Office *of* Economic Development

Exporting Basics: Seminar 5
May 19, 2010

- a) International Legal Considerations
- b) E-tools for Small and Medium-Sized Enterprises



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Export Regulations

- **The Export Administration Regulations (“EAR”) control the export and reexport of items for reasons of national security, non-proliferation, foreign policy and short supply.**
- **See http://www.access.gpo.gov/bis/ear/ear_data.html to access export database information.**
 - Small number of exports and reexports require a license application the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”)
- **Licensing is dependent on a product’s technical characteristics, destination, end use, and end user.**
 - EAR groups items (commodities, software, and technology) into 10 categories, each containing numerous entries that bear Export Control Classification Numbers (ECCNs). These entries are found in Supplement No. 1 to part 774 of the EAR or the Commerce Control List (CCL).
 - The CCL and the Country Chart (Supplement No. 1 to Part 738) together define items subject to export controls solely on the basis of technical parameters on the item and the country of ultimate destination.
 - Items that are on the CCL but do not require a license by reason of the Country Chart and items classified as EAR99 (see section 734.3 (c) of the EAR) are designated as “NLR” (no license required).



Export Regulations

- **Once a classification is determined, exporters may use a single chart, set forth in the EAR, to decide if a license is needed to export to a particular country.**
 - Regulations include FAQs, detailed step-by-step instructions to finding out if a transaction is subject to the EAR, instructions for requesting a commodity classification or an advisory opinion, and directions for applying for a license.
 - You may call your local Export Assistance center to find out whether your product requires a license: David Fiscus, Director, (801) 255-1871 ext. 3 or email David.Fiscus@mail.doc.gov.
- **Make sure your products are shipped where you intend them to go.**
 - As obvious as this may sound, the U.S. Government requires a destination control statement on shipping documents. The commercial invoice and bill of lading (or air waybill) for US exports must display a statement notifying the carrier and all foreign parties that the U.S. shipment has been approved for export only to certain destinations and may not be diverted.



Export Regulations

- The minimum **antidiversion statement** for goods exported under the U.S. Department of Commerce authority must say: “These commodities, technology or software were exported from the U.S. in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited.”
- Exceptions to the use of the destination control statement are listed in Part 758.6 of the EAR. Advice on the appropriate statement to use can be provided by the US Dept. of Commerce, an attorney or a freight forwarder.
- **Do not support restrictive trade practices, such as foreign boycotts of countries friendly to the U.S.**
 - U.S. has a policy of opposing restrictive trade practices and it is implemented through the anti-boycott provisions of the Export Administration Act (enforced by the USDOC) and through a 1977 amendment to the Tax Reform Act of 1976 (enforced by the U.S. Dept. of the Treasury).
 - In general, it is not advisable to participate or support foreign boycotts.



Export Regulations

- **The anti-boycott regulations carry out this general purpose by:**
 1. Prohibiting U.S. agencies or persons from refusing to do business with blacklisted firms and boycotted friendly countries pursuant to foreign boycott demands.
 2. Prohibiting U.S. persons from discriminating against, or agreeing to discriminate against, other U.S. persons on the basis of race, religion, gender or national origin in order to comply with a foreign boycott.
 3. Prohibiting U.S. citizens from furnishing information about business relationships with boycotted friendly countries or blacklisted firms in response to boycott requirements.
 4. Providing for public disclosure of requests to comply with foreign boycotts.
 5. Requiring U.S. persons who receive requests to comply with foreign boycotts to report receipt of the requests to the U.S. department of Commerce and to disclose publicly whether they have complied with such requests.



Export Regulations

- **The Foreign Corrupt Practices Act of 1977 (as amended):**

1. The U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") generally prohibits U.S. companies and citizens, foreign companies listed on a U.S. stock exchange, or any person acting while in the United States, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (the "Antibribery Provisions"). The FCPA also requires "issuers" (any company including foreign companies) with securities traded on a U.S. exchange or otherwise required to file periodic reports with the Securities and Exchange Commission ("SEC") to keep books and records that accurately reflect business transactions and to maintain effective internal controls (the "Books and Records and Internal Control Provisions").
2. The FCPA is jointly enforced by the Department of Justice ("DOJ") and the SEC. Proof of a U.S. territorial nexus is not required for the FCPA to be implicated against U.S. companies and citizens, and FCPA violations can, and often do, occur even if the prohibited activity takes place entirely outside of the United States. For this reason, business leaders must be knowledgeable about all business activity, including activity that takes place thousands of miles away from corporate headquarters.
3. Resources: <http://www.usdoj.gov/criminal/fraud/fcpa>



North American Free Trade Agreement

- Provides for the elimination of tariffs on most goods originating in Canada, Mexico and the U.S.
- Tariffs will be eliminated only on goods that originate in one of the 4 ways defined in article 401 of the NAFTA:
 1. Goods wholly obtained or produced entirely in the NAFTA region
 2. Goods meeting a specific Annex 401 origin rule
 3. Goods produced entirely in the NAFTA region exclusively from originating materials.
 4. Unassembled goods and goods whose content does not meet the Annex 401 rule of original but contains NAFTA regional value of 60% according to the transaction value method or 50% according to the the net-cost method.
- Article 502 of the NAFTA requires that importers base their claims of the country or origin on the exporter's written certificate of origin, which may be the U.S. - approved certificate (CF 434), the Canadian certificate of origin (Form B-232) or the Mexican certificate of origin (Certificado de Origen). The certificate may cover a single shipment, or it may be used as a blanket declaration for a period of 12 months. In either case, the certificate must be in the importer's possession when the importer is making the claim.



U.S. Foreign Trade Zones

- As an exporter, your enterprise should consider the customs privileges of a U.S. Foreign Trade Zones (FTZ). These zones are domestic U.S. sites that are considered outside U.S. customs territory and are available for activities that might be otherwise be carried on overseas for customs reasons.
- For export operations there are certain advantages: FTZs provide accelerated export status for purposes of excise tax rebates (Specifically, these include the [Extraterritorial Income Exclusion \(EIE\)](#) and [Interest-Charge Domestic International Sales Corporations \(IC-DISC\)](#). There is no issue of drawback because duties are not collected when the goods are in the FTZ.
- The Salt Lake City Foreign-Trade Zone is located at a 55 acre site at 1105 South 4800 West and is planned for development of 1.2 million square feet of warehouse, distribution and/or light manufacturing facilities. The newly reactivated zone replaces one that was begun in 1977 at the International Center but has been inactive since 1995. The new FTZ is managed and developed by The Rockefeller Group.
- If you are interested in this topic, forward questions by e-mail to Elizabeth Goryunova at egorn@wtcut.com or call her at WCTU at (801) 532-8080.



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Intellectual Property Considerations

- **DEFINITION:** Intellectual Property rights is a term referring to a number of distinct types of creations of the mind for which property rights are recognized--and the corresponding fields of law. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions.
- **Intellectual property rights are customarily divided into two main areas:**
 - (i) Copyright and rights related to copyright: The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright, for a minimum period of 50 years after the death of the author.
 - Also protected through copyright and related (sometimes referred to as “neighboring”) rights are the rights of performers (e.g. actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organizations. The main social purpose of protection of copyright and related rights is to encourage and reward creative work.



Intellectual Property Considerations

(ii) Industrial property.

- One area can be characterized as the protection of distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin).

Other types of industrial property are protected primarily to stimulate innovation, design and the creation of technology. In this category fall inventions (protected by patents), industrial designs and trade secrets.

A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures and licensing.

The protection is usually given for a finite term (typically 20 years in the case of patents).

- While the basic social objectives of intellectual property protection are as outlined above, it should also be noted that the exclusive rights given are generally subject to a number of limitations and exceptions, aimed at fine-tuning the balance that has to be found between the legitimate interests of right holders and of users.
- Objectives of IPL: protect work product in order for owner to financially benefit.



Intellectual Property Considerations

- **International Agreements**

- Paris Convention for the Protection of Industrial Property of March 20, 1883 (as amended on September 28, 1979): U.S. and 172 other countries are signatories.
- The Paris Convention applies to the protection of industrial property and includes:
 - **Patents for 12 months;**
 - **Utility models - not available in India;**
 - **Industrial designs for 6 months;**
 - **Trademarks, service marks and trade names for 6 months;**
 - **Indication of source or appellations of origin (this is same as the geographical indications adopted in TRIPS - Trade Related Aspects of Intellectual Property Rights).**
- The principal features of the Paris Convention have been listed below:
 - **National treatment**
 - **Right of priority**
 - **Independence of patents**
 - **Parallel importation**
 - **Protection against false indications and unfair competition**



Intellectual Property Considerations

- **Meaning of national treatment under the Paris convention**

- This is a very important concept and is essential for successfully achieving the fundamental aim of the Paris Convention. The idea is to provide equal treatment to applicants from member countries, in a given member country and not to differentiate between the nationals of your country and nationals of the other countries for the purpose of grant and protection of industrial property in your country. Imagine that a national of country X applies for grant of a patent in India. According to the Paris Convention, the Indian Patent Office shall apply the same norms and rules to the applicant from X, as applicable to an Indian applicant, for granting a patent. Similarly, the applicant from X shall have the same protection after grant and identical legal remedies against any infringement shall be available to the applicant provided the conditions and formalities imposed upon Indians are complied with. No requirement as to domicile or establishment in the country where protection is claimed, may be imposed.

- **Right of priority and its significance**

- Industrial property right is granted for a fixed period of time by a country. The date from which the right is deemed to start is usually the date of filing of complete specification. To obtain rights in other member countries, the application must be filed on the same day if it is desired to have the rights started from the same day. However, there are practical difficulties in synchronizing the activities. For facilitating Simultaneous protection in member countries, the Convention provides that within 12 months of national filing, if patent applications are filed in member countries, the patents, if granted in member countries, will be effective from the date of national filing. This right is known as the right of priority.



Intellectual Property Considerations

- In case the applicant after a second look at the patent application finds that the patent contains more than one invention or on his/her own accord wishes to divide the application, he/she can claim the initial date of priority for subsequent patent applications. The applicant may also, on his/her own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.
Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

- **Grant of a patent in one country and its affect on grant or refusal in another country**

- The patents applied for in the various countries of the Union shall be independent of each other with regard to nullity and forfeiture and their normal duration. This means that granting a patent in one country of the Union does not force other countries to grant the patent for the same invention. Also, the refusal of the patent in one country does not mean that it will be terminated in all the countries.

- **Importation in relation to working of a patent under the Convention**

- Importation is considered as working of a patent, provided the patented product is manufactured in a member country and is imported in other member country, which has also granted a patent on the same invention to the same applicant. Imagine that a product X has been patented in two member countries A and B. The product X is then manufactured in country A and imported into country B. This product X shall enjoy the same patent protection in country B even though it has been manufactured in country A. This would also be considered as if the patent has been worked in country B.



Intellectual Property Considerations

- **Provision for compulsory license in the Paris Convention**

- Each member country shall have the right to provide for the grant of compulsory licenses to prevent the abuses resulting from the exclusive rights conferred by the patent. Compulsory licenses for failure to work or insufficient working of the invention may not be requested before the period of time of non-working or insufficient working has elapsed. This time limit is four years from the date of filing of the patent application or three years from the date of the grant. Such licenses will be a non-exclusive and non-transferable one.

- **Relationship between the Paris Convention and the TRIPS Agreement**

- **TRIPS (Trade Related Aspects of Intellectual Property Rights – must be adhered by WTO members) Agreement is an offshoot of a series of negotiations going on around the world since the inception of the Paris Convention in the year 1883. It has been made mandatory for the member countries of the TRIPS Agreement to comply with the Article 1 to 12 and Article 19 of the Paris Convention.**
- Note: Not all countries adhere to the Paris Convention, but similar benefits may be available under local law.
- U.S. is also a party to the **Patent Cooperation Treaty (PCT)** which allows procedures for filing patent applications in its members countries. The PCT allows you to file one international application that designates member countries in which a patent is sought. Filing the international application extends the period in which you have to fulfill the national requirements for each country by 18 months.



Intellectual Property Considerations

- This additional time may be useful as your company evaluates the chances of obtaining patents in target countries, assesses the technical value of your invention and the continued need for protection in those countries and determines where to eventually proceed with the application. Once your company makes those determinations, you will need to fulfill the various national requirements for entry into the national phase (e.g. national fees, filing fees, etc.).
- Berne Convention for the Protection of Literary and Artistic Works of 1886: The Berne Convention states that all works except photographic and cinematographic shall be copyrighted for at least 50 years after the author's death, but parties are free to provide longer terms, as the European Union did with the 1993 Directive on harmonizing the term of copyright protection. For photography, the Berne Convention sets a minimum term of 25 years from the year the photograph was created, and for cinematography the minimum is 50 years after first showing, or 50 years after creation if it hasn't been shown within 50 years after the creation. Countries under the older revisions of the treaty may choose to provide their own protection terms, and certain types of works (such as phonorecords and motion pictures) may be provided shorter terms.



Intellectual Property Considerations

- The **World Intellectual Property Organization Copyright Treaty** was adopted in 1996 to address the issues raised by information technology and the Internet. These new issues were not addressed by the Berne Convention.
- The U.S. is also a member of the **Universal Copyright Convention (UCC)** and has special bilateral relations with a number of foreign countries. The UCC was developed by United Nations Educational, Scientific and Cultural Organization as an alternative to the Berne Convention for those states which disagreed with aspects of the Berne Convention, but still wished to participate in some form of multilateral copyright protection. These states included developing countries and the Soviet Union, which thought that the strong copyright protections granted by the Berne Convention overly benefited Western developed copyright-exporting nations, and the United States and most of Latin America. The United States and Latin America were already members of a Pan-American copyright convention, which was weaker than the Berne Convention. The Berne Convention states also became party to the UCC, so that their copyrights would exist in non-Berne convention states.
 - **Since almost all countries are either members or aspiring members of the World Trade Organization, and are thus conforming to the Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), the UCC has lost significance.**
- Google WIPO for references.



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Intellectual Property Considerations

- **U.S. Law Issues**

- **Patent Law:** differs from patent law in most other countries in several important aspects.
 1. Grants a patent to the first inventor, even if another person independently makes the invention and files the application first. Most countries: it is the first applicant who is protected.
 2. One-year grace period that does not preclude an inventor from obtaining protection after an act such as publishing, offering for sale, or using the invention in such a way that it becomes public. Most countries: no grace period: you disclose you loose. In countries with absolute novelty rule, inventor must file application before invention can become public.
 3. Most countries require that an invention be worked locally to be granted benefit of a patent. Working a patent may require commercial-scale manufacture within country or it may be met with importation of goods covered by the patent (local law applies).
 4. U.S. law prohibits filing abroad without a foreign filing license from the Patent and Trademark Office unless 6 months have elapsed since U.S. application was filed. This prohibition protects against transfers of information that might damage national security. See export control laws.



Intellectual Property Considerations

– Trademark Law:

1. Trademark is a type of intellectual property, and typically a name, word, phrase, logo, symbol, design, image, or a combination of these elements. There is also a range of non-conventional trademarks comprising marks which do not fall into these standard categories.
2. When a trademark is used in relation to services rather than products, it may sometimes be called a service mark .
3. In the U.S. the applicable protections under trademark law are in effect under the “first use” rule. In most countries, registration is key and the mark must be used in-country to retain protection.
4. The rights to a trademark can be lost through abandonment, improper licensing or assignment, or genericity. A trademark is abandoned when its use is discontinued with an intent not to resume its use. Such intent can be inferred from the circumstances. Moreover, non-use for three consecutive years is prima facie evidence of abandonment. The basic idea is that trademark law only protects marks that are being used, and parties are not entitled to warehouse potentially useful marks.



Intellectual Property Considerations

– Copyright Law:

1. **Copyright** is the set of exclusive rights granted to the author or creator of an original work, including the right to copy, distribute and adapt the work. These rights can be licensed, transferred and/or assigned. Copyright lasts for a certain time period after which the work is said to enter the public domain. Copyright applies to a wide range of works, including computer programs, that are substantive and fixed in a medium. Some jurisdictions also recognize "moral rights" of the creator of a work, such as the right to be credited for the work.
2. The Statute of Anne 1709, full title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned", is now seen as the origin of copyright law. Since the 19th Century copyright is described under the umbrella term intellectual property along with patents and trademarks.
3. Copyright has been internationally standardized, lasting between fifty and one hundred years from the author's death, or a shorter period for anonymous or corporate authorship. Generally, copyright is enforced as a civil matter, though some jurisdictions do apply criminal sanctions.



E-tools for SMEs

- **Definition: Electronic commerce**, commonly known as (e-shopping) **e-commerce** or **eCommerce**, consists of the buying and selling of products or services over electronic systems such as the Internet and other computer networks.
- The use of commerce is conducted in this way, spurring and drawing on innovations in electronic funds transfer, supply chain management, Internet marketing, online transaction processing, electronic data interchange (EDI), inventory management systems, and automated data collection systems.
- Modern electronic commerce typically uses the World Wide Web at least at some point in the transaction's lifecycle, although it can encompass a wider range of technologies such as e-mail as well.
 1. A large percentage of electronic commerce is conducted entirely electronically for virtual items such as access to premium content on a website, but most electronic commerce involves the transportation of physical items in some way. Online retailers are sometimes known as e-tailers and online retail is sometimes known as **e-tail**. Almost all big retailers have electronic commerce presence on the World Wide Web.
 2. Electronic commerce that is conducted between businesses is referred to as business-to-business or B2B. B2B can be open to all interested parties (e.g. commodity exchange) or limited to specific, pre-qualified participants (private electronic market). Electronic commerce that is conducted between businesses and consumers, on the other hand, is referred to as business-to-consumer or B2C.



E-tools for SMEs

- There is a trend for corporations to modify their web presence in order to seek new business certain regions in the international market which they had previously thought to be beyond their resources.
- This trend is also reflected in the search for new supply sources and services to meet their international needs and new partners to share manufacturing and marketing responsibilities.
- For certain industries, going online reduces variable costs associated with international marketing. Performing functions such as payment, order processing, after-sales service, marketing (direct email) and advertising online mitigate traditional start-up costs international market development and “brick & mortar” market penetration strategies.

BASIC STEPS TO GOING ONLINE

1. Select a domain name

- a) URL (uniform resource locator) – short, simple, descriptive, memorable
- b) Localize URL: increased brand awareness, site address recall & loyalty
- c) Local search engines: display only locally relevant content
- d) Internationalized or multilingual domain names allow customers to search and access sites in their native language (non-ASCII characters).

2. Register with Search Engines

- a) Multiple Search Engines (<http://www.wordsinarow.com/wheretogo.html>)
- b) Research search engines that are popular with target markets



E-tools for SMEs

3. Choosing a Web Host

- a) Free and subscription based Web-hosting services, including ISPs.
- b) Services go beyond Web Site Maintenance: domain name registration; Web Site design, and Search Engine registration.
- c) Stable infrastructure and optimized reliability.

4. Localizing Web Content

- a) Critical component of exporter's corporate strategy for Web site & business development
- b) Basic features:
 - Language
 - Cultural nuances such as differences in color associations and symbols
 - Payment preferences
 - Pricing in appropriate currency
 - Currency converter
 - Metric Measurements
- c) See www.lisa.org (Localization Industry Standards Association)

5. Marketing your Site

- a) Press releases in local market
- b) Send info to local trade publications
- c) Domain name in all your collateral material
- d) Get web site visitors to sign up to receive occasional opt-in"ads (promo emails). Stats show that opt-in ad users tend to purchase up to seven times more than other visitors.



E-tools for SMEs

Payment Modes and Terms:

1. Credit Cards: for B2C transaction, many overseas customers use credit cards but credit cards are not a universally common method of online payments. Credit cards have certain risks, such as costly chargeback fees.
2. Account-to-account transfers: A2A transfers are electronic transfers between the customer's and the merchant's banks. A2A occur in real time and reduce risk of fraud and chargebacks. Rare in U.S.
3. Person-to-person transfers: P2P occur when funds are sent electronically to a 3rd party, which in turn deposits the funds in the merchant's account, e.g. PayPal.

» Outsourcing Operations:

- focus on core business
- reduced costs
- reduced risk, fraud screening
- flexibility of many banks

» Services Provided:

- international credit and debit cards
- direct debit
- real-time bank transfers
- bank transfers
- cash and bill payments
- eWallets
- prepaid methods
- checks



E-tools for SMEs

Helpful Links:

www.globalcollect.com
www.authorize.net
www.propay.com
www.paypal.com

Online Taxation

1. Consult your attorney
2. Know tax requirements of target market

Privacy

1. Many countries have privacy laws
2. Comply or face prosecution

Security

1. Post a security statement on your web site to reassure customers

Electronic Signatures

1. An online sale is an enforceable sales contract. However, in many countries a contract must be signed to be valid and enforceable.
2. May or may not recognize electronic signatures.
3. Verify valid technologies



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Future Seminar Topics

Seminar #6: June 23

- Shipping your product
- Pricing, Quotations and Terms



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